Law Reform Commission

# Assessment of Damages under The Fatal Accidents Act for the Loss of Guidance, Care and Companionship

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# ASSESSMENT OF DAMAGES UNDER *THE FATAL ACCIDENTS ACT* FOR THE LOSS OF GUIDANCE, CARE AND COMPANIONSHIP

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# CHAPTER 1

# INTRODUCTION

## A. THE REFERENCE

This Report deals with the assessment of damages under section 3(4) of *The Fatal Accidents Act*[1] for the loss of *guidance, care and companionship* suffered by family members on the wrongful death of a person. The matter was referred to us by the Minister of Justice after the Court of Appeal's decision in *Braun Estate* v. *Vaughan*[2] in which the Court affirmed its view that section 3(4) calls for a conventional (standardized) and moderate award of damages without indexation for inflation.

## B. OUTLINE OF REPORT

Chapter 2 discusses the genesis of section 3(4) and its interpretation by the Court of Appeal. Chapter 3 describes the experience of other Canadian jurisdictions in dealing with the compensation of *non-pecuniary* losses such as grief and the loss of guidance, care and companionship. Chapter 4 reviews the recent report of the Law Commission of England and Wales on the issue. Chapter 5 reviews options for reform and, finally, Chapter 6 contains the Commission's recommendations. This is followed by an Executive Summary of the Report in English and French.

## C. ACKNOWLEDGEMENTS

The Commission is grateful to Prof. Philip Osborne of the Faculty of Law, University of Manitoba, who prepared this Report. We also wish to thank Bonnie Macdonald, the research assistant who undertook the legal research during the conduct of the project.

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[1] *The Fatal Accidents Act*, C.C.S.M. c. F50.

[2] *Braun Estate* v. *Vaughan* (2000), Man. R. 35 (C.A.); (2000), 3 W.W.R. 465 (Man. C.A.).

# CHAPTER 2

# THE GENESIS AND INTERPRETATION OF SECTION 3(4) OF *THE FATAL ACCIDENTS ACT*

## A. BACKGROUND

Every common law province in Canada has fatal accidents legislation. That legislation permits an action to be brought by the family members of a deceased person where his or her death has been caused by the intentional or negligent act of another. Initially, the plain language of the legislation, coupled with a conservative judicial interpretation of it, restricted the claim of family members to their monetary or *pecuniary* losses. Damages were calculated solely with reference to the financial contribution the deceased would have made to the family but for his or her untimely death. This provided an important protection for the economic integrity of families but it did not take into account the intangible *non-pecuniary* losses such as the grief, sorrow and anguish of an early bereavement or the loss of companionship, guidance, counsel and care that family members might have anticipated if the deceased had lived. No damages could be awarded for *non-pecuniary* losses under the fatal accidents legislation.

By 1970, two distinct developments had relieved, to a minor extent, the harshness of the law of Manitoba in respect of *non-pecuniary* losses arising from wrongful death. The first has been referred to as the *St. Lawrence Factor* and the second was the claim by the deceased's estate for *loss of expectation of life*. The *St. Lawrence Factor* derives from the case of *The St. Lawrence & Ottawa Railway Co* v. *Lett*.[1] In that case, the Supreme Court recognized that certain losses that might more comfortably be described as *non-pecuniary* losses could, for the purposes of facilitating the recovery of damages, be characterized as *pecuniary* losses. The deprivation of a mother's care, education and training can, for example, be regarded as a loss of a pecuniary nature and may be assessed as a separate head of damage.[2] In this way, lip service could be paid to a scheme of responsibility that did not admit to the awarding of *non-pecuniary* damages. In *Clement* v. *Leslies Storage Ltd.*,[3] for example, Morse J. of the Manitoba Queen's Bench awarded $9,000, $12,000 and $14,000 under this head of damage to children aged 13, 10 and 9 respectively, who

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[1] *The St. Lawrence & Ottawa Railway Co.* v. *Lett* (1885), 11 S.C.R. 422.

[2] This approach was affirmed by the Supreme Court in *Vana* v. *Tosta* (1967), 66 D.L.R. (2d) 97 (S.C.C.).

[3] *Clement* v. *Leslies Storage Ltd.* (1977), 82 D.L.R. (3d) 469 (Man. Q.B.).

had lost both of their parents.[4]

The second, and more indirect way, in which *non-pecuniary* losses could be compensated was by an action of the deceased's estate for the deceased's loss of expectation of life. This claim was first recognized by the House of Lords in *Rose* v. *Ford*.[5] The claim recognized that the deceased had a right that his or her life would not be shortened by the wrongful actions of another and, in the absence of the deceased, his or her estate would be permitted to recover damages for that loss. Ultimately, the damages were distributed to the beneficiaries under the deceased's will. In Manitoba, section 55(1) of *The Trustee Act*[6] provided legislative authority for the estate to sue for loss of expectation of the deceased's life. A constant feature of this claim was the difficulty in determining the appropriate quantum of damages to be awarded to the estate. In 1941, in *Benham* v. *Gambling*,[7] the House of Lords called for an objective consideration of the deceased's prospects for a happy life and an assessment of damages that was conventional and moderate. In both respects, the courts in Manitoba followed *Benham*. Consideration was given to the evidence of the deceased's future had he or she lived. In the absence of compelling evidence to the contrary, it was often found that the deceased could have expected a reasonable degree of happiness and satisfaction from life. By 1970, awards between $7,000 and $10,000 were the norm.

There was, however, some dissatisfaction with the claim for loss of expectation of life. First, awards of damages conventionally compensate plaintiff's for their own loss. A person's anticipation of a happy and satisfying life is a highly personal expectation. Its loss cannot be compensated by paying money to other persons. Secondly, the assessment of happiness is so speculative as to defy any defensible or rational calculation of the quantum of the award. Thirdly, the identity of the ultimate beneficiaries of the award depends upon the distribution of the estate under the law of succession and the terms of the deceased's will. Fourthly, in practice, any award under *The Trustee Act* which benefitted a family member was taken into account in the assessment of damages under *The Fatal Accidents Act* in order to avoid any duplication of damages.

By 1978, the deficiencies of the claim for loss of expectation of life had led every province other that Manitoba to abolish it. In 1976, the Attorney General made a reference to the Manitoba Law Reform Commission to study and make recommendations on the estate's claim for loss of expectation of life. Prior to its final Report, the Commission issued a Working Paper entitled *Rationalizing Actionable Fatalities Claims and Damages*. In 1979, the Commission published its

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[4]This approach is still used in those provinces that have not amended their *Fatal Accidents* legislation to include a discrete legislative provision allowing for recovery of certain non-pecuniary losses.

[5]*Rose* v. *Ford*, [1937] A.C. 826 (H.L.).

[6]*The Trustee Act*, R.S.M. 1970, c. T160.

[7]*Benham* v. *Gambling*, [1941] A.C. 157 (H.L.).

final report on *The Estate Claim for Loss of Expectation of Life*.[8]

## B. MANITOBA LAW REFORM COMMISSION REPORT ON *THE ESTATE CLAIM FOR LOSS OF EXPECTATION OF LIFE*

The Manitoba Law Reform Commission's Report on *The Estate Claim for Loss of Expectation of Life* contained two central and related recommendations. The first was that the claim of the estate for loss of expectation of life under section 55(1) of the *Trustee Act* be abolished. Secondly, *The Fatal Accidents Act* should be amended to provide that the damages recoverable for wrongful death may include an amount to compensate for the loss of *guidance, care and companionship* that the claimant might reasonably have expected to receive from the deceased if the death had not occurred. In collateral recommendations, the Commission suggested that all persons who suffer such loss should be entitled to benefit under the new head of damage and that the new cause of action should not survive to the benefit of the claimant's estate.

A number of observations about these recommendations may be useful. First, no recommendation was made to compensate family members for the grief, sorrow, anguish or the psychic pain of the bereavement itself. The heads of damage are all loosely related to the idea of *services* that the deceased would have provided to the family. Compensation is provided for what the claimants would have received from the deceased rather than the claimant's emotional distress caused by the defendant. This is consistent with the reluctance of the common law to provide damages for transient emotional distress of any kind. Secondly, the Report does not consider the issue of the *quantum* of damages in any depth. The Report does, however, appear to reject the use of conventional (standardized) awards. The Report notes " . . . it would be wrong to settle on an arbitrary figure and . . . an *assessment* should continue to be made by the courts."[9] Thirdly, the Commission did not closely define the range of claimants who could benefit from this new cause of action. The matter was to be left to the discretion of the courts to determine who had suffered a loss of the kind that was recoverable. Fourthly, the proposed cause of action was consistent with conventional damages assessment principles which seek to compensate directly those who have suffered loss as a consequence of the wrongdoing.

## C. IMPLEMENTATION OF THE REPORT ON *THE ESTATE CLAIM FOR LOSS OF EXPECTATION OF LIFE.*

In 1980, the Manitoba Legislature passed *An Act to Amend the Fatal Accidents Act and the*

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[8]Manitoba Law Reform Commission, *The Estate Claim for Loss of Expectation of Life* (Report #35, 1979).

[9]*Id.*, at 22 [emphasis added].

*Trustee Act*.[10] The Act abolished the action of the estate for the loss of expectation of life and added section 4(4) [now renumbered section 3(4)] to *The Fatal Accidents Act*. The section reads:

> Notwithstanding The Equality of Status Act, where an action has been brought under this Act, there may be included in the damages awarded an amount to compensate for the loss of guidance, care and companionship that the deceased, if he had lived, might reasonably have been expected to give to any person for whose benefit the action is brought and in making an apportionment under subsection 10(1) the judge shall apportion those damages among the persons who might reasonably have been expected to receive the guidance, care or companionship if the deceased had lived.

The Act also declared that a claim for loss of guidance, care and companionship does not survive, in case of death, to the benefit of the claimant's estate. The Act closely followed the Commission's earlier recommendations but it departed from those recommendations in respect of those who may claim for loss of guidance, care and companionship. The claims under section 3(4) are restricted to those members of the family who are permitted to bring a claim under *The Fatal Accidents Act*. They include a spouse including a common law spouse as defined in the Act, parents, children and siblings. Extended definitions of these terms are found in the definition section of the Act. This was, however, a change more in form than in substance because the listed relatives are those most likely to suffer a loss of guidance, care and companionship. Nevertheless, the range of claimants is circumscribed by the Act and it does not, for example, include distant relatives, close friends or business associates. For the purposes of this Report, the most important aspect of the Act is that it does *not* address in any way the process of assessment or quantum of damages available to the claimants. That issue was left to the discretion of the courts.

## D. THE JUDICIAL INTERPRETATION OF SECTION 3(4) OF *THE FATAL ACCIDENTS ACT*

Section 3(4) of *The Fatal Accidents Act* left the assessment of damages and the quantum of damages for the loss of guidance, care and companionship to the discretion of the courts. The evaluation of *non-pecuniary* losses of any kind is not an easy exercise and the formula of loss of *guidance, care and companionship* did not provide any useful or reliable guide on the issue. The conventional wisdom suggests that *pecuniary* losses generally take priority over *non-pecuniary* losses and that no amount of money can fully compensate for *non-pecuniary* loss flowing from the death of a close family member. Consequently, some degree of moderation is called for particularly where there may be a number of claimants. On the other hand, quantum should not be so low as to be perceived as insulting to surviving relatives.

At least two approaches to this difficult assessment process suggest themselves. First, a court may attempt to make an *individual assessment* of the loss of each claimant. Evidence may

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[10] *An Act to Amend the Fatal Accidents Act and The Trustee Act*, S.M. 1980, c. 5.

be received about the general nature of the relationship between the deceased and the claimant, the extent and quality of the guidance, care and companionship that the deceased had provided before his or her death, the age of the claimant, the proximity of the relationship between the claimant and the deceased and any evidence of what the future might have held for the relationship. The court could then tailor the quantum to compensate the degree of the loss. This approach would not have to forsake moderation but consistency would give way to a more personal assessment. Secondly, a court could award conventional (standardized) sums dependent on the status of the claimant. This approach avoids the invidious task of taking evidence from grieving family members as to the extent and intensity of their personal losses. It also facilitates the settlement process by avoiding the use of evidence of the individual relationships between the deceased and the claimants as required by the individualized process. These conventional sums might vary according to the proximity of the relationship or could be uniform for all claimants. The conventional sums might be modest or generous.

In a trilogy of cases in the mid 1980s, the Manitoba Court of Appeal interpreted section 3(4) of *The Fatal Accidents Act* as calling for *conventional* and *moderate* awards. The leading case is *Rose Estate* v. *Belanger*.[11] In that case, the defendant caused the death of a husband and father of a four-year-old boy. Huband J.A., speaking for the Court, alluded to the difficulty of assessing incommensurables and noted that moderate sums were appropriate. In his view, awards amount to a "compassionate allowance"[12] unrelated to pecuniary losses. He concluded:[13]

> In making awards under s.4 (4) [sic] of the *Fatal Accidents Act*, it is desirable that conventional sums be established which then can be awarded *in all but the most unusual cases*, and hence make it unnecessary at a trial to proceed through the painful examination of the quality or value of the guidance, care and companionship.

The conventional award chosen for both the deceased's spouse and his son was $10,000 each. Nothing was said in the judgment about indexing the conventional sum to inflation. Less than a month later, a differently constituted panel of the Court of Appeal released its decision in *Lawrence's Estate* v. *Good*.[14] In that case, the deceased was a spouse and mother of four children. The Court followed the approach of Huband J.A. and characterized the award under section 3(4) as a "compassionate allowance". Again the sum of $10,000 was chosen as the norm. The third case was *Larney Estate* v. *Friesen*.[15] It dealt with the death of a 19 year old woman. The claimants included the deceased's mother and her brother and sister. Their claims were primarily

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[11] *Rose Estate* v. *Belanger* (1985), 32 Man. R. (2d) 282 (C.A.).

[12] *Id*, at 288.

[13] *Rose Estate, supra* n. 11, at 289 [emphasis added].

[14] *Lawrence's Estate* v. *Good* (1985), 33 Man. R. (2d) 312 (C.A.).

[15] *Larney Estate* v. *Friesen* (1986), 41 Man. R. (2d) 169 (C.A.).

for a loss of companionship. Matas J.A., who spoke for a majority of the Court, noted the importance of consistency and modesty in the award of damages under this head of loss and, consequently, favoured the continued use of conventional awards. He noted that, unless conventional awards are used, evidence must be received on the value of the deceased's life, the nature of her relationship with her close relatives and the quality of her companionship. That process, in his view, would be futile and would exacerbate the grief and emotional distress of the family. In the absence of special circumstances or unusually close or dependent relationships, the conventional awards of $10,000 for the mother and $2,500 for each of the siblings was appropriate.

It may be noted that the Court of Appeal did not address the issue of inflation in any of its decisions. This is in marked contrast to the approach of the Supreme Court in respect of damages for *non-pecuniary* loss such as pain and suffering arising from *personal injury* in *Andrews* v. *Grand & Toy Alberta Ltd.*[16] In that case, the Court held that it was inappropriate and futile to attempt to award damages to compensate for pain and suffering and impairment of mental and physical faculties by making an *evaluation* of what the plaintiff had lost. The award can do no more than provide some solace to the plaintiff, allowing him or her to purchase goods and services that might replace in some way the pleasures that had been taken away by the accident. The award must be reasonable and, in respect of the most serious injuries, a cap of $100,000 was placed on awards for *non-pecuniary* damages. The Court, however, made it clear that the cap would rise with inflation. It is now approximately $270,000.

The general practice in Manitoba in respect of the conventional sums for loss of guidance, care and companionship was *not* to index them to inflation. The conventional sum of $10,000 continued to be used until the trial judge in *Braun Estate* v. *Vaughan* [17] increased the award to take inflation into account. It was a case of medical malpractice and the deceased was a mother of three. The trial court awarded $14,500 to each of her children, $14,500 to each of her parents, $10,000 to her spouse (the marriage had been plagued by separations) and $3,500 to each of her three siblings. The global amount awarded under section 3(4) was $93,000. These awards were reviewed by the Court of Appeal.[18]

The Court of Appeal examined two issues. The first was whether to set a new conventional award for the loss of a parent, spouse or child which was more in line with other Canadian provinces. The suggested sum was between $20,000 and $30,000. Secondly, if the existing conventional sum is maintained should it be indexed to inflation? On the first issue, the Court recognized that other provinces awarded more generous compensation for the loss of guidance, care and companionship. Nevertheless, the Court concluded that moderation and predictability were best achieved by maintaining the status quo and that there was no "compelling reason" to

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[16] *Andrews* v. *Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229.

[17] *Braun Estate* v. *Vaughan* (1997), 124 Man. R. (2d) 1 (Q.B.).

[18] *Braun Estate* v. *Vaughan* (2000), Man. R. 35 (C.A.); (2000), 3 W.W.R. 465 (Man. C.A.).

reconsider the general range of awards established in *Rose Estate*. The Court found the second issue more problematic. The plaintiffs' argument was based largely on the fact that judicial awards for *non-pecuniary* loss arising from *personal injuries* are indexed for inflation. The Court of Appeal, however, distinguished the award for *non-pecuniary* loss arising from personal injuries from the fatal accidents claim for the loss of guidance, care and companionship. The former award is designed to provide solace and is intended to be spent on goods and services to provide pleasure and enjoyment in substitution of those that have been lost. Because the money is intended to purchase goods and services, it is appropriate to index the award to inflation to maintain its purchasing power. In the Court's view the award for loss of guidance, care and companionship is neither to compensate nor to provide solace or comfort. It is a modest compassionate allowance. "It is in reality a formal declaration or statement of sympathy, sanctioned by the law which recognizes that a wrong has been done."[19] As such, in the Court's view, there is no reason for it to be indexed to inflation. The Court, therefore, eliminated the inflation factor of the awards made by the trial judge.

## E. SUMMARY OF THE CURRENT POSITION IN MANITOBA

The current position in Manitoba may be summarized by using a framework of analysis which has four components: the legislative provision that authorizes the award (*the legislation*); the range of claimants (*claimants*); the judicial approach to assessment (*assessment principles*); and the quantum of awards (*quantum*). This provides a useful framework of analysis not only for the position in Manitoba but also for a comparison of other Canadian jurisdictions found in the next Chapter.

### 1. Legislation

The right of family members to sue for the loss of guidance, care and companionship is found in section 3(4) of *The Fatal Accidents Act*[20] It reads:

> Notwithstanding The Equality of Status Act, where an action has been brought under this Act, there may be included in the damages awarded an amount to compensate for the *loss of guidance, care and companionship* that the deceased, if he had lived, might reasonably have been expected to give to any person for whose benefit the action is brought and in making an apportionment under subsection 10(1) the judge shall apportion those damages among the persons who might reasonably have been expected to receive the guidance, care or companionship if the deceased had lived. [emphasis added]

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[19] *Id.*, at para. 82.

[20] *The Fatal Accidents Act*, C.C.S.M. c. F50.

## 2. Claimants

In Manitoba, under section 3(1) of the Act, the claimants include:

-spouses including common law spouses as defined in section 3(5) of the Act;
-parents including grandparents, step-parents and persons in *loco parentis* to the deceased;
-children including grandchildren, step-children and a person to whom the deceased stood in *loco parentis*;
-siblings.

## 3. Assessment Principles

In Manitoba, no personal assessment of the claimant's loss of guidance, care or companionship is made. In all cases, modest conventional awards are made without reference to the particular circumstances of the relationship between the deceased and the claimant.

## 4. Quantum

The standard award for spouses, parents and children is $10,000. Siblings receive $2,500.

# CHAPTER 3

# COMPENSATION FOR THE LOSS OF GUIDANCE, CARE AND COMPANIONSHIP ARISING FROM WRONGFUL DEATH IN OTHER CANADIAN JURISDICTIONS

## A. INTRODUCTION

Consideration is given here to the law relating to the compensation of the *non-pecuniary* loss of family members arising from wrongful death in other Canadian jurisdictions. The framework of analysis that was used earlier to summarize the position in Manitoba is used to describe the jurisdictions examined in this Chapter. Consideration is given, in turn, to:

- the legislative provision, if any, which authorizes the award (*the legislation*);
- the range of claimants (*claimants*);
- the judicial approach to assessment (*assessment principles*);
- the quantum of damages awarded (*quantum*); and
- any additional comments or observations (*miscellaneous).*

It may be noted that all jurisdictions have their own and often extended definitions of categories of claimants. For example, child may include step-child and grandchild. In this Chapter of the Report, reference is made only to the general class of claimant such as spouse, child, parent, and sibling unless the complete definition is particularly pertinent to the issue at hand. Complete definitions can be found in the legislation of each jurisdiction and in the judicial interpretation of those provisions.

In Canada, many jurisdictions have amended their fatal accidents legislation to include a discrete legislative provision directing that damages be awarded for the *non-pecuniary* loss of the family of the deceased. The wording of the provision is not uniform but damages for loss of guidance, care and companionship are normally covered. In those jurisdictions that have not amended their legislation (British Columbia, Saskatchewan, Newfoundland, Northwest Territories and the Yukon Territory), some protection is given to family members by characterizing claims for the loss of care and guidance as claims for pecuniary damage which fall comfortably within the conventional interpretation of fatal accidents legislation. Clearly, the experience of those provinces with similar provisions to section 3(4) of the Manitoba *Fatal Accidents Act* is most relevant to the matter at hand. The situation in other jurisdictions is, however, also described because the essence of the claim is often the same as that made under section 3(4).

## B. PROVINCES WITH LEGISLATIVE PROVISIONS PERMITTING CLAIMS FOR LOSS OF GUIDANCE, CARE AND COMPANIONSHIP

### 1. Ontario

#### (a) Legislation

The general right of family members to sue a tortfeasor in respect of a fatal accident is found in section 61(1) of the *Family Law Act.*[1] Section 61(2) includes the provision that

> The damages recoverable in a claim under subsection (1) may include...
> (e) an amount to compensate for *loss of guidance, care and companionship* that the claimant might reasonably have expected to receive from the person if the injury or death had not occurred. [emphasis added].

#### (b) Claimants

Claims for loss of guidance, care and companionship may be brought by *spouses, children, parents, and siblings.* At the margins, these categories have been given a generous definition by the courts of Ontario.[2]

#### (c) Assessment principles

The courts of Ontario have generally rejected the notion of conventional awards for the loss of guidance, care and companionship. The quantum of the award depends "on the facts and the circumstances in evidence in the case."[3] Consequently, evidence must be adduced of the nature of the relationship of the deceased and the individual claimant. Factors which are taken into account include the age of the claimant and his or her physical and mental condition, the intimacy and quality of the relationship of the deceased and the claimant, the frequency of contact between the claimant and the deceased, the emotional resilience of the claimant, the degree of dependency on the deceased, the extent of the claimants other close and supportive relationships both before and after the accident and the pre-accident joint life expectancy of the claimant and the deceased. The assessment process in Ontario is sensitive to the uniqueness of family relationships and encourages an individualized assessment of the claimant's loss.

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[1] *Family Law Act*, R.S.O. 1990, c. F.3.

[2] See *Wessell* v. *Kinsmen Club of Sault Ste. Marie Ontario Inc.* (1982), 37 O.R. (2d) 481 (H.C.); *Vincent* v. *Israels*, [1994] O.J. No. 1846 (Gen. Div.); *Andani Estate* v. *Peel (Regional Municipality)*, [1989] O.J. No. 625 (H.C.).

[3] *Mason* v. *Peters* (1982), 39 O.R. (2d) 27 at 40 (C.A.).

### (d) Quantum

The individualized assessment process makes it difficult to generalize about quantum but a review of the awards made during the 1990s indicates that they are considerably higher than those in Manitoba. Although there are exceptions at each end of the scale, spouses receive between $30,000 and $50,000, parents between $25,000 and $40,000, children between $25,000 and $30,000 and siblings between $7,500 and $10,000.

## 2. Nova Scotia

### (a) Legislation

The right of family members to sue a tortfeasor in respect of a fatal accident is found in the *Fatal Injuries Act*.[4] Section 5(2) states that damages may be awarded under section 5(2)(d) "to compensate for the *loss of guidance, care and companionship* that a person for whose benefit the action is brought might reasonably have expected from the deceased if the death had not occurred." [emphasis added]

### (b) Claimants

The claims for loss of guidance, care and companionship may be brought by parents, children and spouses.

### (c) Assessment principles

The Nova Scotia Court of Appeal has rejected the use of conventional awards for loss of guidance, care and companio· ship.[5] The Court held that the proper approach was to assess damages on a case-by-case basis, albeit tempered by reasonable limits and guided by other cases on the issue. In the few cases on point the Nova Scotia, courts appear to be quite attentive to the nature of the relationship and the facts of the case.

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[4] *Fatal Injuries Act*, R.S.N.S. 1989, c. 163.

[5] *Campbell* v. *Varanese*. [1991] N.S.J. No. 179 (C.A.).

### (d) Quantum

There have not been a sufficient number of judicial decisions in Nova Scotia to draw any reliable generalizations about quantum. The awards seem to fall somewhere between those of Manitoba and Ontario. For spouses and young children, an award of $20,000 seems to be the norm. Parental awards are more variable ranging from $2,500 to $25,000. This reflects, in large part, variations in the age of the child and the closeness of the relationship between the parent and child.

## 3. New Brunswick

### (a) The Legislation

The right of family members to sue a tortfeasor in respect of a fatal accident is found in the *Fatal Accidents Act*.[6] The claim for non-pecuniary loss is carefully circumscribed by section 3(4) of the Act.

> 3(4) Where an action has been brought under this Act for the benefit of one or more *parents* of the deceased and the deceased is a child
>
> (a) under the age of nineteen, or
>
> (b) nineteen years of age or over who was dependent on one or more parents for support
>
> there may be included in the damages
>
> (c) to the parents, where paragraph (a) applies, or
>
> (d) to the parents on whom the deceased was dependent, where paragraph (b ) applies,
>
> an amount to compensate for the *loss of companionship* that the deceased might reasonably have been expected to give to the parents and an amount to compensate for the *grief* suffered by the parents as a result of the death. [emphasis added]
>
> 3(5) An amount included in the damages under subsection (4) shall be apportioned among the parents in proportion to the loss of companionship incurred and grief suffered by each parent as a result of the death.

The provision is notable for its direct reference to grief as a compensable head of damage.

### (b) Claimants

Claims for the loss of companionship and grief may only be brought by "parents" (as extensively defined in the section 1 of the Act) of any child under the age of 19 and a dependant

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[6] *Fatal Accidents Act*, R.S.N.B. 1973, c. F-7.

child over 19. Spouses, children and siblings are only able to claim for their pecuniary loss.

### (c) Assessment principles

In *Nightingale* v. *Mazarell*,[7] the New Brunswick Court of Appeal discussed the correct approach to assessing damages for grief and loss of companionship. The award for *grief* must be fair and reasonable. It cannot be accurate, or compensatory or reparative. It must not be unduly sympathetic to the plaintiff nor punitive of the defendant. It should be as objective as possible and take into consideration awards for non-pecuniary loss in other cases, the socio-economic impact of the award and the desirability of predictability and certainty. The intensity of personal grief and the manner of its outward manifestation in individual cases should not be given consideration. Consequently, the award is largely conventional.

Similar principles are applicable to assessing damages for the *loss of companionship* of the child but consideration of the degree of companionship that might have been anticipated from the deceased and the age of the child, his or her health and general living circumstances are also taken into account.

### (d) Quantum

There is a great deal of consistency in the awards for grief and loss of companionship. The courts have tended to make one award of *approximately* $15,000 for grief and to award a similar amount for loss of companionship for a total of $30,000. This amount is normally split between the parents resulting in a $15,000 payment to each parent.[8]

## 4. Prince Edward Island

### (a) Legislation

The right of family members to sue a tortfeasor in respect of a fatal accident is found in the *Fatal Accidents Act*.[9] Section 3(c) states that damages may be awarded "to compensate for the loss of *guidance, care and companionship* that the claimant might reasonably have been expected to have received. [emphasis added].

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[7] *Nightingale* v. *Mazerall* (1992), 87 D.L.R. (4th) 158 (N.B.C.A.).

[8] *Id.*; see also, *Guimond* v. *Guimond Estate* (1995), 160 N.B.R. (2d) 278 (Q.B.); *Savoie Estate* v. *Gauvin* (1995), 150 N.B.R. (2d) 219 (Q.B.).

[9] *Fatal Accidents Act*, R.S.P.E.I. 1988, c. F-5.

### (b) Claimants

The legislation in Prince Edward Island is notable for the very extensive range of claimants sanctioned by the legislation. It includes parents, spouses, children[10] and a wide range of other persons coming within the term 'dependant' including the spouse of a child, grandchild or parent of the deceased, a dependent ex-spouse, a dependent common law spouse and *any person* who had been dependent on the deceased for at least three years.

### (c) Assessment principles

This issue has not been addressed by the courts of Prince Edward Island.

### (d) Quantum

This issue has not been addressed by the courts of Prince Edward Island.

## 5. Alberta

### (a) Legislation

The Alberta legislation is unique. Section 8(1) of the *Fatal Accidents Act*,[11] which was added in 1994, permits a restricted class of claimants to be awarded damages for *"grief* and *the loss of guidance, care and companionship"* of the deceased person. No evidence of damage is required and the quantum of damages payable is a *conventional* amount set by the *legislation*.

### (b) Claimants

The potential claimants under section 8(1) are described much more restrictively than under the Act generally. Eligible claimants include husband, wife, cohabitant (a person of the opposite sex to the deceased who lived with the deceased for the three year period immediately preceding the death of the deceased and was during that period held out by the deceased in the community in which they lived as the deceased's consort), father, mother, son or daughter. Moreover parents only have a right to claim in respect of the death of *minor* children and unmarried children between the ages of 18 and 26 provided that the deceased was not living with a cohabitant at the time of his

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[10] "Child", for example, includes a child conceived but not born, an adopted child and a person to whom the deceased stood in place of a parent.

[11] *Fatal Accidents Act*, R.S.A 1990, c. F-5.

or her death. Similarly children only have a right to claim if, at the time of the death, they were minors, or were between the ages of 18 and 26 and not living with a cohabitant at the time of the parent's death. Furthermore, no damages may be awarded to a spouse who was living separate and apart at the time of the deceased's death. Damages are awarded to the cohabitant and not to the spouse if, at the time of death, the deceased person was living separate and apart from the spouse and with the cohabitant.

The intent of the Act appears to be to restrict the claim to those relatives who in the normal course of events are most intensely affected by the death of a person.

### (c) Assessment principles

This is not an issue because the legislation itself sets the amount of damages. No judicial interpretation is required.

### (d) Quantum

The quantum of damages is set by the legislation and may be adjusted periodically by regulation. In 1994, the quantum was set at $40,000 for a spouse or cohabitant, $40,000 for the parent or parents, to be split equally where the action is brought for the benefit of both persons, and $25,000 to children. In February 2000, the amounts were increased to $43,000 to eligible spouses, $43,000 to eligible parents and $27,000 to eligible children.

### (e) Miscellaneous

It may be noted that these generous amounts are paid to a more restricted range of relatives than in Manitoba. If we assume the children in *Braun* were minors, the amounts payable in Alberta would be $43,000 for the spouse and $27,000 for each of the three children for a total of $121,000. No payment would be made to the parents of an adult married child nor to her siblings.

## C. PROVINCES WITH NO DISCRETE LEGISLATIVE PROVISION FOR THE RECOVERY OF DAMAGES FOR LOSS OF GUIDANCE, CARE AND COMPANIONSHIP

British Columbia, Newfoundland, Saskatchewan, Northwest Territories and the Yukon Territory have not amended their legislation to include a discrete legislative provision for the loss of guidance, care and companionship. However, some of these losses are reasonably capable of being characterized as *pecuniary losses* which have always comfortably fallen within the scope of recovery under the Act. This was made clear in two Supreme Court decisions. The leading

decision is *The St. Lawrence & Ottawa Railway Co.* v. *Lett*.[12] The case involved a claim by the spouse and child of a woman who was killed by the negligence of a railway company for the loss of guidance and care of the deceased. The Supreme Court held that this head of damage may, in appropriate cases, amount to a pecuniary loss and is, therefore, compensable. Ritchie C.J. wrote:

> I must confess myself at a loss to understand how it can be said that the care and management of a household by an industrious, careful, frugal and intelligent woman, or the care or bringing up by a worthy loving mother of a family of children, is not a substantial benefit to the husband and children; or how it can be said that the loss of such a wife and mother is not a substantial injury but merely sentimental, is, to my mind, incomprehensible. And if the injury is substantial, the only mode the law could provide for reimbursing the husband and children is by a pecuniary compensation, and so, in my opinion, in the eye of the law, the injury is a pecuniary injury.[13]

This decision was re-affirmed by the Supreme Court in *Vana* v. *Tosta*.[14] The Court held that the loss of parental care and guidance may be considered a pecuniary loss. However, evidence must be adduced

> . . . to support a reasonable inference that the future of the children has been adversely affected by their mother's death and that they will suffer a resultant pecuniary loss which is capable of being expressed in terms of "such damages as will afford a reasonable . . . compensation for the substantial injury sustained", to employ the phrase used by the Chief Justice in the *Lett* case.[15]

The element of solatium is excluded from the making of an award for loss of care and guidance.

Although this claim is open to all eligible plaintiffs under the pertinent legislation, it is children who can most easily establish that the loss of care and guidance of a deceased parent is a pecuniary loss.

The position in each jurisdiction that continues to apply *Lett* and *Tosta* will now be considered.

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[12] *The St. Lawrence & Ottawa Railway Co.* v. *Lett* (1885), 11 S.C.R. 422.

[13] *Id.*, at 435.

[14] *Vana* v. *Tosta* (1967), 66 D.L.R. (2d) 97 (S.C.C.).

[15] *Id.*, at 109, per Ritchie J.

## 1. British Columbia

### (a) Legislation

Fatal accident claims are handled in British Columbia under the *Family Compensation Act*.[16] The Act has not been amended to permit a discrete claim for the loss of guidance, care and companionship. Consequently, recovery under those heads of damage is available only where the claimant can establish some pecuniary loss including a loss of services of the deceased such as a loss of care and guidance.

### (b) Claimants

Claimants under the legislation include extended definitions of spouses, parents and children. However, the restrictions arising from *Lett* and *Tosta, in practice*, generally exclude claims other than those of parents whose deceased children assisted them in their essential daily tasks or otherwise provided beneficial services to them, of minor children for their loss of guidance and care in respect of the death of a parent and sometimes those of adult children where there was an active relationship and care and guidance from the deceased. All these claims can comfortably be characterized as pecuniary.

### (c) Assessment principles

There has been some unevenness in the way assessment principles for the loss of care and guidance have been articulated and applied in British Columbia. The Court of Appeal has suggested that the award to a child in respect of the death of a parent must to some degree be conventional but it did not lay down any particular fixed sum as appropriate in all cases and it did recognize the importance of taking inflation into account.[17] The resulting practice of the courts has been to use a conventional *range* of damages but continue, within that range, to be sensitive to the facts of the case.

### (d) Quantum

The conventional range for damages for a child's loss of care and guidance of a deceased parent is $25,000 to $30,000. Any award to either parents or adult children is normally much less.

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[16] *Family Compensation Act*, R.S.B.C. 1996, c. 126. See, British Columbia Law Reform Commission, *Pecuniary Loss and the Family Compensation Act* (Report #139, 1994).

[17] *Plant* v. *Chadwick*, [1986] 6 W.W.R. 131 (B.C.C.A.).

## 2. Newfoundland

### (a) Legislation

The general right of family members to sue in respect of a wrongful death in Newfoundland is found in the *Fatal Accidents Act*.[18] It has not been amended to allow a discrete claim for loss of guidance, care and companionship.

### (b) Claimants

Under the Act, claims may be made by a husband, wife, parents and children. An extended definition of child and parent is found in the Act.

### (c) Assessment principles

Claims for loss of care and guidance must be brought in accordance with the principles in *Lett* and *Tosta*. The awards are made on a case-by-case basis and careful scrutiny is given to the pecuniary nature of the claim.[19] These claims are most easily established by minor children in respect of the loss of a parent but a spouse's claim for loss of care and counsel has been accepted.[20]

### (d) Quantum

There are very few cases on point but, in the 1999 decision of *Lynch Estate* v. *Anderson*,[21] $25,000 was awarded to a daughter who suffered from cerebral palsy for the loss of care and guidance of her father who was very involved in her daily living. The deceased's spouse was awarded $10,000. This indicates a substantial increase from earlier in the decade. In *McLean* v. *Carr Estate*,[22] for example, three minor children were awarded $9,000, $7,000 and $6,000 and the deceased's spouse was awarded $3,000.

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[18] *Fatal Accidents Act*, R.S.N. 1990, c. F-6.

[19] *Smith* v. *Wells and Employers Reinsurance Corp.* (1993), 105 Nfld. & P.E.I.R. 351 (Nfld. C.A.).

[20] *McLean* v. *Carr Estate* (1994), 125 Nfld. & P.E.I.R. 165 (Nfld. S.C.T.D.).

[21] *Lynch Estate* v. *Anderson* (1999), 180 Nfld. & P.E.I.R. 225 (Nfld. S.C.T.D.).

[22] *McLean* v. *Carr Estate*, *supra* n. 20.

## 3. Saskatchewan

### (a) Legislation

The general right of family members to sue in respect of the wrongful death of a family member is found in the *Fatal Accidents Act*.[23] There is no discrete provision permitting a claim for the loss of guidance, care and companionship but section 4(2)(c) permits damages to be awarded for the cost of grief counselling.

### (b) Claimants

Spouses, parents and children are able to bring a claim under the Act. As is usual, the definition section defines these terms generously.

### (c) Assessment principles

Claims for loss of care and guidance must be brought pursuant to the principles in *Lett* and *Tosta*.[24] Consequently, only pecuniary claims are entertained. Compensation is awarded on a case-by-case basis. In Saskatchewan, these claims are difficult to establish and tend to be restricted to claims by minor children for the loss of the care and guidance of a parent.[25]

### (d) Quantum

There are not enough recent cases to draw any general conclusions but the awards to minor children have been moderate.[26] In the last decade, they have ranged from less than $1,000 to $25,000 and indeed did so in one case involving seven children. [27]

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[23] *Fatal Accidents Act*, R.S.S. 1978, c. F-11.

[24] *Beauchamp* v. *Entem Estate* (1986), 51 Sask. R. 99 (Q.B.).

[25] Claims by parents were rejected in *Beauchamp* v. *Entem Estate, id.*

[26] *Campbell Estate* v. *Wernicke* (1989), 76 Sask. R. 161 (Q.B.) ($2,000); *Attorney-General of Canada* v. *Ahenakew* (1987), 31 D.L.R. (4th) 472 (Sask. Q.B.) ($12,500); *Naeth Estate* v. *Warburton* (1992), 103 Sask. R. 130 (Q.B.) ($11,700).

[27] *Davies* v. *Gabel Estate*, [1995] 2 W.W.R. 35 (Sask. Q.B.).

## 4. Northwest Territories [28]

### (a) Legislation

The general right of family members to sue in respect of a fatal accident caused by a tortfeasor is found in the *Fatal Accidents Act*.[29] It contains no discrete power to award non-pecuniary damages for loss of care, guidance and companionship.

### (b) Claimants

Actions may be brought for the benefit of spouses, parents and children as defined by the Act.

### (c) Assessment principles

Claims for loss of care and guidance must be brought pursuant to the principles in *Lett* and *Tosta*.

Consequently, only claims for pecuniary loss will be entertained. No award was made, for example, to parents of a six year old boy.[30] Compensation is assessed on a case-by-case basis.

### (d) Quantum

There are too few cases to draw any conclusion about the quantum that may be awarded in the Northwest Territories.

## 5. Yukon Territory

### (a) Legislation

The general right of family members to sue in respect of a death caused by a tortfeasor is

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[28]It may be noted that Nunavut Territory adopted the laws of the Northwest Territories on April 1, 1999.

[29]*Fatal Accidents Act*, R.S.N.W.T. 1988, c. F-3.

[30]*Stokes* v. *Levesque*, [1995] 9 W.W.R. 61 (N.W.T.S.C.).

found in the *Fatal Accidents Act*.[31]

### (b) Claimants

Actions may be brought for the benefit of spouses, parents and children as defined in the Act.

### (c) Assessment principles

Claims are assessed pursuant to the principles in *Lett* and *Tosta*. The claims must, therefore, be for pecuniary loss. There is little authority on the point but it seems likely that claims are assessed on a case-by-case basis.[32]

### (d) Quantum

There are too few cases to draw any general conclusions but, in *Geddes*,[33] an adopted child who suffered fetal alcohol syndrome received $55,000 for the loss of care and guidance of both his parents who were killed by the defendant.

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[31] *Fatal Accidents Act*, R.S.Y. 1986, c. 64.

[32] *Geddes (Guardian ad litem of)* v. *Holt*, [1994] Y.J. No. 18 (S.C.).

[33] *Id.*

## CHAPTER 4

## THE REPORT OF THE LAW COMMISSION OF ENGLAND AND WALES ON CLAIMS FOR WRONGFUL DEATH

In November 1999, the Law Commission issued a Report on *Claims for Wrongful Death*.[1] In the course of that Report, the Commission dealt with damages for grief, sorrow and loss of care, guidance and companionship which, in the United Kingdom, are referred to collectively as bereavement damages. The Commission's discussion of the issue and its recommendations are informative and useful to the task at hand.

The Commission gave special attention to the function of bereavement damages. In its view, the purpose of these damages is *compensatory* and the award is designed, "*in so far as a standardized award of money can,*" to compensate for grief and sorrow and the loss of care, guidance and society that the deceased would have provided the eligible claimants. The Commission pointed out that the purpose of the award of damages is not to punish the defendant, it is not a symbol of the wrongfulness of the death and it is not a reflection of the value of the deceased's life. These objectives, which are commonly ascribed to bereavement damages by the public, lead to dissatisfaction with the quantum awarded.

The Commission recommended that the fact of bereavement of eligible claimants be presumed and need not be proved. The Commission sought to avoid distasteful and unpleasant litigation on the reality and depth of the grief and sorrow of individual claimants. For similar reasons, the Commission favoured a conventional or standardized sum payable to the eligible claimants.

The Commission concluded with four major recommendations on this issue. First, the list of eligible claimants should be more extensive that is currently the case. It should include spouses, parents, children, siblings, fiancees, all of which are broadly defined. Secondly, the quantum payable to eligible claimants should be raised from £7,500 to £10,000. In setting this amount, the Law Commission was influenced by the responses to its Consultation Paper which preceded its Report.[2] That paper had suggested the £10,000 figure as one which allowed for inflation and amounted to a modest increase from the existing £7,500. Fully two-thirds of the respondents agreed with the Commission. A quarter of the respondents favoured a larger increase while the remainder favoured an unspecified increase or no change. Thirdly, an overall ceiling of £30,000 should be imposed in respect of a single death. If there are more than three claimants, the global

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[1]The Law Commission (Eng.), *Claims for Wrongful Death* (Report #263, 1999).

[2]The Law Commission (Eng.), *Claims for Wrongful Death* (Consultation Paper #148, 1997).

amount should be shared equally. Fourthly, the compensation should be indexed to take into account inflation.

# CHAPTER 5

# OPTIONS FOR REFORM

There are five main options to assessing the award of damages for the loss of guidance, care and companionship:

- the use of modest conventional sums without indexing for inflation (the current position in Manitoba);
- the use of modest conventional sums indexed to inflation;
- the use of an *increased* conventional sum indexed to inflation or subject to periodic review;
- the use of personal assessment of loss tailored to individual claimants; and
- conventional sums combined with a power to increase an award in special circumstances.

The advantages and disadvantages of each will be canvassed below.

## A. MODEST CONVENTIONAL SUMS WITHOUT INDEXING

This option is favoured by the Manitoba Court of Appeal. It reflects the view that the purpose of the award of damages for loss of guidance, care and companionship is not primarily to compensate for non-pecuniary loss or to provide solace to the bereaved or to provide deterrence of wrongful conduct or to punish the tortfeasor. Its primary function is to provide a compassionate allowance, a public recognition of the wrongfulness of the death and a recognition of the family member's loss. This position can be supported in a number of ways, some of which have been identified by the Court of Appeal.

First, no amount of money can replace what has been lost and, therefore, any attempt to value a claimant's loss is futile and prone to extravagance. A modest conventional award fulfils the function of public recognition and indexing for inflation is not called for. Secondly, this approach is the most efficient method of assessment. No evidence of personal circumstances is required. This relieves the court from the distasteful task of measuring the personal impact of the death on individual family members, facilitates settlements and shortens trials. Thirdly, although an individual payment to a claimant may seem small, the global amount payable to all potential claimants in respect of a single wrongful death may be considerable. In *Braun*, the Court of Appeal's award was globally in excess of $60,000. This is of special relevance in Manitoba where the range of potential claimants is quite large. Fourthly, most defendants in wrongful death actions

are insured. Ultimately, therefore, those who purchase liability insurance (the public) will absorb the pecuniary and non-pecuniary losses. Since *full* compensation is paid for financial loss, it is reasonable that some limit is imposed in respect of the family's non-pecuniary loss. Fifthly, private sector first party group life insurance normally provides for very modest sums payable on the death of *dependant* family members. Non-pecuniary loss does not, therefore, appear to be a high public priority.

This approach does have its disadvantages and criticisms. First, it may be suggested that the conventional sum is simply too low. Even as a compassionate allowance, $10,000 is insufficient to mark, in an appropriate way, the wrongfulness of the death and the claimant's loss. The awards are lower than those in other provinces with similar legislation. It is difficult to justify this disparity in the treatment of Canada's citizens when their loss is the same. This concern is exacerbated in Manitoba by the lack of indexation for inflation. The value of the conventional sum is destined to erode even further in the future to the point where it may be seen by some claimants as more insulting than empathetic. Secondly, the use of a modest conventional compassionate allowance can be argued to be inconsistent with the legislative language of section 3(4) of *The Fatal Accidents Act* which states that the award of damages is to *compensate* for the loss of *guidance*, *care* and *companionship*. It deliberately defines the heads of damage (all of which deal with a loss of services) for assessment. That is not an easy task but it appears to be the task set by the legislation and it is a task which is consistent with common law damages assessment principles. Thirdly, a moderate conventional award not only fails to promote the compensatory function of damages, it also fails to provide a sufficient degree of deterrence and punishment of the tortfeasor. Fourthly, although the award is termed a compassionate allowance the value of money is ultimately linked to the goods and services that it can purchase. Indexing maintains the value of the symbolic award and creates consistency among awards over time. Fifthly, money must be put to some purpose and a reasonable purpose for some claimants is to purchase care and guidance services in place of those that would have been provided by the deceased, in which case, indexing is appropriate.

## B. MODEST CONVENTIONAL SUMS WITH INDEXING

The general advantages and disadvantages of a conventional and modest award have been outlined above. The issue here is, assuming the current Manitoba position is maintained, should the awards be indexed for inflation? The position of the Court of Appeal is supported by its interpretation of the function of the award as a public recognition of a wrong committed against the claimant and not as a compensatory assessment of loss or the provision of solace. The alternative view is that the conventional lump sums were set in a social and economic setting and they reflect a quantum that was appropriate in that context. Many of the factors that informed that decision remain unchanged. One factor that has changed is the purchasing power of money and indexation allows an incremental adjustment of the lump sum to maintain its integrity as a compassionate allowance. Moreover, the failure to index will, at some point in the future, result in an award that in terms of value is niggardly, inappropriate, and even insulting. One might

theoretically defend the Court of Appeal's position but it will be increasingly difficult to justify it to claimants whose sudden loss is incalculable and who inevitably will respond viscerally to the quantum as some measure of the deceased's worth.

## C. AN INCREASE IN THE QUANTUM COUPLED WITH INDEXATION OR PERIODIC REVIEW

This option directly raises the issue of whether or not Manitoba's conventional awards are too low and the extent to which they should be increased. There is no scale or measure to determine the appropriate conventional sums. It is a matter of impression, intuition and social policy.

It may be argued that the lump sums should be increased to $30,000 for spouses, parents and children and $15,000 for siblings. These are substantial sums of money but they are more in line with other provinces. As was noted above, some degree of consistency among provinces may be desirable and the loss of Manitobans should not be devalued in comparison to that of other citizens of Canada. These sums may be more acceptable to the majority of claimants and may be deemed a more appropriate societal recognition of the family's loss than the current amounts being awarded. Moreover, increased sums are unlikely to create an undue burden for defendants, most of whom are insured, and it is unlikely to overburden the liability insurance system in a province where work accidents and motor vehicle accidents are the subject of no-fault insurance plans.

The Court of Appeal has made the case for no increase in the lump sums and that case has been described earlier. Little can be added to it other than to point to factors which may justify the more moderate sums in the Manitoba context. There may be a case for greater consistency among the various compensatory vehicles in Manitoba. Private sector group life and disability insurance plans are usually tailored to provide very moderate amounts in respect of the death of a *dependant* family member. This indicates that there is little demand that private insurance cover non-financial losses. Public sector accident compensation plans also tend to pay moderate amounts for the non- pecuniary loss of the surviving family members. On the other hand, it may be argued that a tort award is unique in that it carries the responsibility of providing a degree of deterrence and punishment against the wrongdoer. This is, however, largely symbolic because the reality of the tort system is that defendants rarely pay tort awards. Liability insurance converts the tort process into a compensatory vehicle, the primary function of which is, like the other compensatory plans, to spread accident losses broadly.

Ultimately, the issue of quantum of a conventional sum is reduced to one of judgment and a sense of what is fair and reasonable in the province.

## D. A PERSONAL ASSESSMENT OF THE CLAIMANT'S LOSS OF GUIDANCE, CARE AND COMPANIONSHIP

A personal assessment of loss similar to that followed in Ontario is made after evidence is provided of all the pertinent factors relating to the issue including the nature of the relationship between the claimant and the deceased, the age of the claimant and deceased, the degree of guidance, care and companionship that might have been provided by the deceased and the quality thereof.

The advantages of this assessment process may be listed. First, this process may be more faithful to the intent of the legislation and to conventional common law assessment principles. The legislation does call for the *compensation* of the claimant's loss. It does not expressly or impliedly suggest a conventional or modest compassionate allowance. Common law assessment principles call for an individualized determination of the plaintiff's loss. Even in the analogous circumstance of non-pecuniary loss arising from personal injuries, a personal assessment of the need for solace is called for, albeit that the award is subject to a cap of approximately $270,000. Secondly, the process recognizes the individualized nature of loss and the different degrees of that loss. Not all cases are the same. Indeed most cases are different and it is a characteristic of the common law that it takes into account those differences and reflects them in the quantum of damages. Thirdly, an individualized assessment assures that claimant that personal attention has to be paid to his or her claim. In this area of the law, process may be as important as quantum. A judicial consideration of the claimant's loss, a personal assessment of that loss and an individually tailored quantum may serve a variety of purposes beyond compensation. It may provide some solace, some therapeutic value assisting in the healing process and may better serve the traditional functions of the tort damages award of deterrence and punishment.

Some of the disadvantages of the personal approach have been mentioned above. First, conventional sums certainly have the advantage of efficiency, certainty and administrative ease. They encourage settlements and reduce the length of trials by negating the need to call evidence of personal relationships. Secondly, the nature of the award for non-pecuniary loss arising from wrongful death is unique. Its function, however the legislation may be phrased, is to recognize an unquantifiable and catastrophic loss and to presume to calculate an appropriate measure of compensation for such a loss is unavoidably distasteful. Thirdly, an individualized system of assessment often adopts a conventional *range* of awards within which assessments are made. Consequently, the difference between a conventional system of assessment and an individualized one is often more one of degree rather than substance. Fourthly, the personal approach does carry the risk of high awards where some degree of restraint is appropriate. Equally, however, a personal approach could be construed in a way that was consistent with the current judicial approach. The adoption of a particular basis of assessment does not dictate the manner in which it may be interpreted or the quantum that will eventually be awarded.

## E. CONVENTIONAL SUMS COMBINED WITH A POWER TO INCREASE AN AWARD IN SPECIAL CIRCUMSTANCES

The four options hitherto discussed fall within reasonably discrete boundaries. It is, however, possible to contemplate a fused approach. One might begin with the position that every eligible claimant is entitled to a conventional sum (the current sum adjusted or not adjusted for inflation or a larger sum) without proof of loss. This would carry the advantages of the conventional sum approach outlined above. This might be supplemented by a judicial power to *increase* the award if the individual circumstances of the claimant warranted it. This would permit some degree of personal assessment of the claimant's losses where there is evidence that his or her loss of guidance, care and companionship is substantially greater than the norm. It would probably be unwise to fetter the judicial discretion to make an increased award other than to indicate that the circumstances favouring an increased award must be unusual, special or extraordinary. For example, the wrongful death of *both* parents of a very young child might warrant an increased award as might the death of a sibling who was acting in *loco parentis* to a young claimant. This approach may marry the advantages of both the conventional and personal assessment approaches while minimizing their disadvantages. On the other hand, it will cause a period of uncertainty while the judicial interpretation of special circumstances is clarified and it may delay settlements.

# CHAPTER 6

# RECOMMENDATIONS

In reaching our final recommendations in respect of the appropriate quantum of compensation for the loss of guidance, care and companionship of a loved one, the Commission has been acutely aware of the limitations of legal remedies in this area. There are some objectives that the law cannot attain. No amount of money can *compensate* family members for what they have lost. The guidance, care and companionship of our loved ones are priceless gifts for which there is no monetary measure. An award of money cannot *evaluate* the worth of a person's life. Such an attempt is futile and profoundly distasteful. No amount of money is likely to *appease* the understandable anger and bitterness of family members. There is little room for *punishment* and *deterrence* when most defendants are insured.

In our view, however, there are two objectives that an award of damages for the loss of guidance, care and companionship can attain. First, we agree with the Court of Appeal that this award is, to some extent, appropriately conceived as a compassionate allowance providing, in an official manner, a public recognition of the loss suffered by the claimants. Secondly, in our view, the award of damages provides some degree of solace for the incalculable loss that has been suffered. Although full reparation is impossible, money may provide some balm for the loss suffered. It may allow the family members to put the money to some useful purpose in memory of the deceased; it may allow them to be involved in activities which strengthen the care and companionship of those who are left behind; it may allow them to purchase goods or services which make life more enjoyable and dull the sharp edge of incalculable sorrow. These are, in our view, the objectives that the law may, in some part, achieve and are the *raison d'être* behind the ultimate answers to the questions of assessment principles and quantum.

We recommend that conventional or standardized sums to compensate for the loss of guidance, care and companionship continue to be used. We are strongly of the opinion that claimants should not be subjected to the indignity of establishing the quality and intensity of their relationship with the deceased and the courts should not be required to make invidious and distasteful assessments of the same. Furthermore, an individualized assessment of loss suggests that the sum awarded is full compensation for the loss. The advantages of the conventional awards have been remarked on earlier and include efficiency, certainty and administrative ease. This approach does run the risk that claimants who may seem undeserving are compensated but that occurrence is not so likely as to warrant a departure from the conventional approach.

***RECOMMENDATION 1***

***That conventional sums continue to be used to compensate for the loss of guidance, care and companionship under section 3(4) of* The Fatal Accidents Act.**

In our view the bench mark sum of $10,000 favoured by the Court of Appeal is much too low. First, it is significantly lower than that awarded in many other Canadian jurisdictions with similar legislative provisions. We can identify no reason for a disparity of treatment among Canada's citizens on this issue. Secondly, the base amount of $10,000 has not been changed since the early 1980s. A quantum that was arguably too low when it was established has been eroded by inflation and fails to reflect public policy which is more sensitive to the psychic distress of citizens. It is our view that the current award is in danger of appearing insulting to claimants. For those claimants who suffer little or no financial loss, such as the parents of an infant child, the cost of recovering the award may exceed the award itself. Thirdly, in our view, the quantum carries not only the burden of being a *compassionate allowance* as suggested by the Court of Appeal but it also must provide some *solace* to the claimants.

In our view, the awards should be increased to align Manitoba more closely with other provinces with similar legislation. We believe that the conventional sums which the courts have been awarding under section 3(4) of *The Fatal Accidents Act* should be increased substantially to $30,000 each for parents, spouses and children. We also believe that the conventional sum paid to siblings should continue to be 25% of that sum. These amounts, we believe, will be seen by the people of Manitoba as reasonable, fair and appropriate given the impossibility of providing full compensation for the loss suffered by the claimants.

***RECOMMENDATION 2***

***That* The Fatal Accidents Act *be amended to provide that the award for the loss of guidance, care and companionship be set at $30,000 each for parents, spouses and children and $7,500 each for siblings of the deceased.***

We also believe that the increased conventional amounts should be increased in tandem with the rate of inflation. We have considered formal mechanisms to achieve that goal such as periodic review and changes to the amount by orders in council or by periodic amendment to the legislation. It is also possible to tie the award to a recognized measure of inflationary trends such as the consumer price index. We recommend none of these. We rely on the judicial experience in dealing with the cap on damages for non-pecuniary loss arising from personal injuries. The courts have been able, without legislative direction or formula, but with the assistance of counsel, to adjust the $100,000 cap for inflation with ease. The adjustment of the increased conventional sums for the loss of guidance, care and companionship can be achieved in a similar manner so long as the legislation implementing the new conventional sums indicates that they are to be adjusted for inflation.

***RECOMMENDATION 3***

***That* The Fatal Accidents Act *be amended to provide that the new conventional awards, as set out in Recommendation 2, be adjusted by the courts according to the prevailing rate of inflation.***

This is a Report pursuant to section 15 of *The Law Reform Commission Act*, C.C.S.M. c. L95, signed this 25th day of October 2000.

Clifford H.C. Edwards, President

John C. Irvine, Commissioner

Gerald O. Jewers, Commissioner

Pearl K. McGonigal, Commissioner

Kathleen C. Murphy, Commissioner

# REPORT ON
# ASSESSMENT OF DAMAGES UNDER *THE FATAL ACCIDENTS ACT* FOR THE LOSS OF GUIDANCE, CARE AND COMPANIONSHIP

## EXECUTIVE SUMMARY

# EXECUTIVE SUMMARY

## A. INTRODUCTION

This project was referred to the Commission by the Minister of Justice. Section 3(4) of *The Fatal Accidents Act* of Manitoba empowers a judge in a wrongful death case to award damages to compensate specified family members for the loss of guidance, care and companionship that the deceased would have provided but for his or her untimely death. The Act provides no guidance as to the amount of damages that may be awarded under this section. It was left to the courts to determine an appropriate amount. The Commission was asked to consider the current judicial practice in this regard and to make recommendations in respect thereof.

## B. CURRENT LAW IN MANITOBA

In 1980, the Manitoba Legislature passed *An Act to Amend the Fatal Accidents Act and the Trustee Act* which abolished the action of the estate for the loss of expectation of life and provided that "...where an action has been brought under this Act, there may be included in the damages awarded an amount to compensate for the loss of guidance, care and companionship that the deceased, if he had lived, might reasonably have been expected to give to any person for whose benefit the action is brought and in making an apportionment, ... the judge shall apportion those damages among the persons who might reasonably have been expected to receive the guidance, care or companionship if the deceased had lived." The Act also declared that a claim for loss of guidance, care and companionship does not survive, in case of death, to the benefit of the claimant's estate. The most important aspect of the Act, in terms of this Report, is that it does *not* address in any way the process of assessment or quantum of damages available to the claimants. That issue was left to the discretion of the courts.

In a series of cases in the 1980s, the Court of Appeal held that claimants under section 3(4) of *The Fatal Accidents Act* should each receive a moderate, conventional (standardized) lump sum award. The lump sums were set at $10,000 for parents, children and spouses of the deceased and $2,500 for siblings of the deceased. Those lump sums have not been increased during the last twenty years. In its recent decision of *Braun Estate* v. *Vaughan*, the Court upheld this practice and declined either to increase the lump sums or to index them to inflation.

## C. OTHER CANADIAN JURISDICTIONS

In this Report, consideration is given in turn to the various provincial legislative provisions, if any, which authorizes the award; the range of claimants; the judicial approach to assessment; the quantum of damages awarded; and miscellaneous comments and observations.

In Canada, many jurisdictions have amended their fatal accidents legislation to include a discrete legislative provision directing that damages be awarded for the *non-pecuniary* loss of the family of the deceased. Although there is no uniformity in terms of wording of the provisions throughout Canada, damages for loss of guidance, care and companionship are normally covered. In those jurisdictions that have not amended their legislation (British Columbia, Saskatchewan, Newfoundland, Northwest Territories and the Yukon Territory), some protection is given to family members by characterizing claims for the loss of care and guidance as claims for pecuniary damage which fall comfortably within the conventional interpretation of fatal accidents legislation.

The method of assessment of damages and the quantum of the award are not uniform among those provinces but the amount awarded to claimants is generally much higher than in Manitoba.

## D. OPTIONS FOR REFORM AND RECOMMENDATIONS

The Commission considered five main options to assessing the award of damages for the loss of guidance, care and companionship:

- the use of modest conventional sums without indexing for inflation (the current position in Manitoba);
- the use of modest conventional sums indexed to inflation;
- the use of an *increased* conventional sum indexed to inflation or subject to periodic review;
- the use of personal assessment of loss tailored to individual claimants; and
- conventional sums combined with a power to increase an award in special circumstances.

In reaching its final recommendations in respect of the appropriate quantum of compensation for the loss of guidance, care and companionship of a loved one, the Commission has been acutely aware of the limitations of legal remedies in this area. There are some objectives that the law cannot attain. No amount of money can *compensate* family members for what they have lost. The guidance, care and companionship of our loved ones are priceless gifts for which there is no monetary measure. An award of money cannot *evaluate* the worth of a person's life. Such an attempt is futile and profoundly distasteful. No amount of money is likely to *appease* the understandable anger and bitterness of family members. There is little room for *punishment* and *deterrence* when most defendants are insured.

In our view, however, there are two objectives that an award of damages for the loss of guidance, care and companionship can attain. First, we agree with the Court of Appeal that this award is, to some extent, appropriately conceived as a compassionate allowance providing, in an official manner, a public recognition of the loss suffered by the claimants. Secondly, in our view, the award of damages provides some degree of solace for the incalculable loss that has been

suffered. Although full reparation is impossible, money may provide some balm for the loss suffered. It may allow the family members to put the money to some useful purpose in memory of the deceased; it may allow them to be involved in activities which strengthen the care and companionship of those who are left behind; it may allow them to purchase goods or services which make life more enjoyable and dull the sharp edge of incalculable sorrow.

We are also strongly of the opinion that claimants should not be subjected to the indignity of establishing the quality and intensity of their relationships with the deceased and the courts should not be required to make invidious and distasteful assessment of the same. Therefore, the Commission recommends the continued use of conventional sums to compensate for the loss of guidance, care and companionship under section 3(4) of *The Fatal Accidents Act*. Additional advantages to the use of conventional awards include efficiency, certainty and administrative ease.

The Commission further recommends that the conventional sums currently used by the courts be increased and that the awards be set by amendment to the Act. We recommend that the increased awards be set at $30,000 each for parents, spouses and children and $7,500 each for siblings. Finally, the Commission recommends that the Act be amended to provide that the new conventional awards be adjusted by the courts according to the prevailing rate of inflation.

# RÉSUMÉ DU RAPPORT SUR

# L'ÉVALUATION DES DOMMAGES-INTÉRÊTS EN VERTU DE LA *LOI SUR LES ACCIDENTS MORTELS* POUR LA PERTE DE SOUTIEN ET D'AFFECTION

# RÉSUMÉ

## A. INTRODUCTION

Le présent projet a été renvoyé devant la commission par le ministre de la Justice. Dans le cadre d'une action fondée sur une mort préjudiciable, le paragraphe 3(4) de la *Loi sur les accidents mortels* du Manitoba donne au juge le pouvoir d'accorder aux membres de la famille au profit desquels l'action est intentée des dommages-intérêts pour compenser la perte de soutien et d'affection que la victime aurait été susceptible de dispenser si elle avait vécu. La *Loi* ne contient aucune disposition en ce qui concerne le montant des dommages-intérêts qui peuvent être accordés aux termes du paragraphe 3(4). La responsabilité de déterminer le montant approprié revenait aux tribunaux. Le mandat de la commission était d'examiner la pratique judiciaire actuelle à cet égard, puis de faire des recommandations.

## B. DISPOSITIONS LÉGISLATIVES AU MANITOBA

En 1980, l'Assemblée législative du Manitoba a adopté la loi *An Act to Amend the Fatal Accidents Act and the Trustee Act* qui abolissait l'action de la succession pour la perte d'espérance de vie. Selon les dispositions de cette loi, lorsqu'une poursuite est intentée en vertu de la *Loi*, les dommages-intérêts accordés peuvent inclure un montant pour compenser la perte de soutien et d'affection que la victime, si elle avait vécu, aurait été susceptible de dispenser envers les personnes au profit desquelles l'action est intentée et le juge doit diviser ces dommages-intérêts entre les personnes qui auraient raisonnablement dû recevoir le soutien et l'affection de la victime, si elle avait vécu. La *Loi* déclare également qu'une réclamation pour perte de soutien et d'affection n'est pas transmissible à la succession du demandeur, en cas du décès de ce dernier. L'aspect le plus important de la *Loi*, selon ce rapport, est qu'elle ne contient aucune disposition sur le processus d'évaluation ou le montant des dommages-intérêts à verser aux demandeurs. Cette décision revenait aux tribunaux.

Dans une série de procès qui se sont tenus dans les années 80, la Cour d'appel du Manitoba a soutenu que les demandeurs devaient recevoir chacun une somme compensatoire conventionnelle (normalisée) modérée. Les montants forfaitaires avaient été établis à 10 000 $ pour chacun des parents, pour le conjoint ou la conjointe et pour chacun des enfants de la victime, et à 2 500 $ pour chacun de ses frères et sœurs. Ces montants forfaitaires n'ont pas connu d'augmentation au cours des vingt dernières années. Dans une décision rendue récemment dans l'affaire *Succession Braun* c. *Vaughan*, la Cour a soutenu cette pratique et décliné que les montants forfaitaires soient augmentés ou indexés à l'inflation.

## C. DISPOSITIONS LÉGISLATIVES AILLEURS AU CANADA

Pour la préparation du présent rapport, la commission s'est penché sur les dispositions législatives de diverses provinces, lorsqu'il en existait, en ce qui concerne l'attribution des compensations, les demandeurs, l'approche judiciaire à l'évaluation, le montant des dommages-intérêts attribués, ainsi que sur des commentaires et observations divers.

Au Canada, nombre de provinces ont modifié leur loi sur les accidents mortels pour inclure une disposition distincte recommandant que les dommages-intérêts soient attribués pour la perte *non pécuniaire* de la famille de la victime. Bien que les dispositions ne soient pas rédigées de manière uniforme dans les textes de loi des diverses provinces, la perte de soutien et d'affection est normalement compensée. Dans les provinces et territoires où la loi n'a pas été modifiée (Colombie-Britannique, Saskatchewan, Terre-Neuve, Territoires du Nord-Ouest et Yukon), les cours accordent une certaine protection aux membres de la famille de la victime en assimilant les réclamations pour perte de soutien à des réclamations pour dommages pécuniaires, ce qui respecte très bien l'interprétation conventionnelle des textes de loi sur les accidents mortels.

La méthode d'évaluation des dommages et le montant des compensations ne sont pas uniformes dans ces provinces, mais les montants accordés sont généralement beaucoup plus élevés qu'au Manitoba.

## D. OPTIONS DE RÉFORME ET RECOMMENDATIONS

La commission a retenu les cinq options suivantes pour déterminer le montant des dommages-intérêts pour la perte de soutien et d'affection :

- l'utilisation de sommes conventionnelles modestes non indexées à l'inflation (la position actuelle du Manitoba);
- l'utilisation de sommes conventionnelles modestes indexées à l'inflation;
- l'utilisation d'une somme conventionnelle *augmentée* indexée à l'inflation ou sujette à une révision périodique;
- le recours à une évaluation personnelle de la perte selon la situation des demandeurs;
- l'utilisation de sommes conventionnelles avec la possibilité d'augmenter les dommages-intérêts dans des circonstances spéciales.

En arrivant aux recommandations finales en ce qui concerne le montant de compensation approprié pour la perte de soutien et d'affection d'un être cher, la commission a dû tenir compte des limites des recours judiciaires dans ce domaine. La loi ne permet pas de résoudre toutes les situations. Aucun montant d'argent ne peut *compenser* la perte d'un être cher. Le soutien et l'affection des gens qu'on aime est un don précieux dont la valeur ne se mesure pas en argent. Un montant d'argent ne peut pas exprimer la *valeur* de la vie d'une personne. Une telle tentative serait futile et de très mauvais goût. Aucune somme d'argent ne peut *apaiser* les sentiments justifiés de

colère et d'amertume liés à la perte d'un membre de sa famille, et il est difficile de *punir* ou de *dissuader* un défendeur quand la plupart des défendeurs sont assurés.

À notre avis, toutefois, il y a deux objectifs que l'attribution de dommages-intérêts pour la perte de soutien et d'affection peut atteindre. D'abord, nous sommes d'accord avec la Cour d'appel sur le fait que la compensation est, jusqu'à un certain point, perçue de manière appropriée comme une indemnité de commisération qui offre une reconnaissance publique officielle de la perte qu'ont subie les demandeurs. Ensuite, à notre avis, l'attribution de dommages-intérêts offre un certain degré de consolation pour la perte incalculable infligée par le décès de la victime. Bien qu'une compensation intégrale soit impossible, l'argent peut apporter un certain réconfort. Il peut être utilisé à des fins pratiques pour honorer la mémoire du défunt; il peut permettre de participer à des activités visant à consolider les liens et l'affection entre les proches de la victime; il peut servir à acheter des produits et services qui rendront la vie plus agréable et atténueront le chagrin.

Nous sommes aussi tout à fais d'avis que les demandeurs ne devraient pas être indignement astreints à établir la qualité et l'intensité de leur relation avec la victime et que les tribunaux ne devraient pas avoir à procéder à ce type d'évaluation malicieuse et abjecte. La commission recommande donc que soit maintenue l'utilisation de montants conventionnels pour compenser la perte de soutien et d'affection en vertu du paragraphe 3(4) de la *Loi sur les accidents mortels*. L'utilisation de montants conventionnels présente aussi l'avantage d'être efficace, sans ambiguïté et facile à administrer.

La commission recommande de plus que les sommes conventionnelles actuellement attribuées par les tribunaux soient augmentées et que leur montant soit stipulé dans la *Loi*. Nous recommandons que ce montant soit de 30 000 $ pour chacun des parents, pour le conjoint ou la conjointe et pour chacun des enfants de la victime, et de 7 500 $ pour chacun de ses frères et sœurs. Finalement, la commission recommande que la *Loi* soit modifiée afin que les nouveaux montants conventionnels soient indexés par les tribunaux au taux d'inflation en vigueur.